

FINAL STATEMENT OF REASONS:

The California Department of Corrections (CDC) proposes to adopt Section 3436 of the California Code of Regulations (CCR), Title 15, concerning Limited Term Light Duty assignments (LD).

The LD regulations accommodate the requirements of a determination by the Office of Administrative Law (OAL) and implement a decision by the Superior Court of California, County of Los Angeles (Department of Administration, Case Number 99-12-0067). OAL Determination No. 9 (2001) declared existing CDC policy language regarding Light Duty to be regulatory requiring promulgation in accordance with the Administrative Procedure Act (APA). The Superior Court found that placing employees in bargaining unit positions other than their own was in violation of employee union contracts.

The regulations allow the Hiring Authority to utilize vacant budgeted positions for LD for qualified employees provided the assignment is necessary to local operations and the position is in the same bargaining unit as the qualified employee. Employees qualify when their primary treating physician documents their medical limitations and there is a vacant budget position that will accommodate their medical limitations. The Return to Work Coordinator facilitates discussion of the employee's potential for LD with the employee's Supervisor/Hiring Authority and documents the acceptance or non-acceptance of the LD assignment in writing. The Hiring Authority may permit the employee to continue working in their current position, while temporarily waiving the essential functions of the position, if LD can be granted consistent with the public health and safety requirements of the position.

3436 Limited Term Light Duty Assignments.

Subsection 3436(a) is adopted to read:

- (a) The Hiring Authority may utilize Limited Term Light Duty Assignments to allow employees with documented medical limitations to work. The employees shall be placed in vacant budgeted positions within the employee's bargaining unit, or continue working in their current position while temporarily waiving the essential functions of the job.

Subsection 3436(b) is adopted to read:

- (b) No position will be permanently identified as a "light duty" position. Limited Term Light Duty for any one employee shall not extend beyond 60 days in a 6-month period for any medical condition(s). In addition, Limited Term Light Duty shall only be offered for the duration of the vacant budgeted position (not to exceed 60-days).

ASSESSMENTS, MANDATES AND FISCAL IMPACT:

This action will neither create nor eliminate jobs in the State of California, nor result in the elimination of existing businesses, or create or expand businesses in the State of California.

The CDC determines this action imposes no mandates on local agencies or school districts; no fiscal effect on Federal funding to the State, or private persons. Total benefits for CDC

are unknown, but will ensure that unbudgeted LD assignments do not occur, eliminating litigation and associated costs. It is also determined that this action does not affect small businesses nor have a significant adverse economic impact on businesses, including the ability of California businesses to compete with businesses in other states because they are not affected by the internal management of State prisons; or on housing costs; and no costs or reimbursements to any local agency or school district within the meaning of Government Code Section 17561.

DETERMINATION:

The CDC has determined that no alternative considered would be more effective in carrying out the purpose of this action or would be as effective and less burdensome to affected persons.

PUBLIC COMMENTS TO ORIGINAL PROPOSED REGULATIONS:

Public Hearing: Held April 7, 2005 at 9:00 a.m.

SUMMARIES AND RESPONSES TO ORAL COMMENTS AT THE PUBLIC HEARING.

Commenter #1 read their written comment at the Hearing. The CDC has responded below under written comment.

SUMMARIES AND RESPONSES TO WRITTEN COMMENTS

Commenter #1

Comment A: Commenter states the regulations are discriminatory because they undermine the CDC's duty to engage in the interactive process and illegally relieves the CDC from its duty to reasonably accommodate individuals with disabilities as mandated by both the Fair Employment and Housing Act (FEHA) and the Americans with Disabilities Act (ADA).

Accommodation: None.

Response to Comment A: The CDC contends that the LD regulations are not discriminatory and do not undermine the CDC's responsibility to engage in the interactive process with the employee or relieve the CDC of the responsibility for providing Reasonable Accommodation (RA) protection under the FEHA and ADA. LD specifically allows the employee to continue to work when medical restrictions are known to be temporary. Rather than undermining the interactive process, LD is a part of the interactive process to be utilized prior to beginning the RA process when LD restrictions do not appear to require long-term or permanent reassignment or change in duties. The CDC has no intention of not providing for RA, when appropriate, under the protection of FEHA and ADA.

Commenter #1

Comment B: Commenter states the regulations are in violation of the Ralph C. Dills Act because they circumvent the collective bargaining process.

Accommodation: None.

Response to Comment B: The CDC contends that during the development of the LD program, the spirit and the intent of the Dills Act was taken into consideration. The Director of CDC met with the California State Employees Association (CSEA) representatives and discussed the unions' position on crossing bargaining unit lines when placing employees on LD. The CSEA responded to the Director with a letter dated August 4, 2003, reporting that

they had surveyed their bargaining units and six out of seven bargaining units agreed with the proposal of not crossing of bargaining unit lines when placing employees. The CDC identified five bargaining units with LD language in their Memorandum Of Understandings (MOU). It is noted that the regulations are consistent with, and the 60 day period exceeds, the MOU provisions of all existing union agreements that contain light duty language.

Commenter #1

Comment C: Commenter states these regulations are arbitrary.

Accommodation: None.

Response to Comment C: The CDC contends the LD program was developed with stakeholder involvement. Keeping employees in their own bargaining unit positions was the result of arbitration, through the courts, prohibiting employees from other bargaining units performing jobs belonging to other bargaining units. The 60 day per 6-month limitation was developed by surveying stakeholders and reviewing existing bargaining unit language. The CDC contends that since this program reflects stakeholder involvement, reflects legal directives from the courts and control agencies, and takes into consideration the health and safety of inmates and staff, it is not arbitrary.

Commenter #1

Comment D: Commenter states these regulations are unnecessary because the State Personnel Board and statutes already address LD found in Government Code Section 19050.8(c) and SPB Rule 443 (CCR Title 2, Division 1, Section 443) respectively.

Accommodation: None.

Response to Comment D: Due to the critical public health and safety nature of most positions within CDC, temporary assignments of the type contemplated by these SPB provisions are simply not available within CDC.

Commenter #1

Comment E: Commenter states the regulations do not comply with the APA and do not constitute an emergency.

Accommodation: None.

Response to Comment E: The CDC contends that it has been given special authority, Penal Code Section (PC) 5058.3, to exercise the use of emergency regulatory filings in order to preserve public health and safety. The CDC is permitted to exercise its right to use PC 5058.3 to file the emergency rulemaking in accordance with the APA. The regulations and the Certification of Operational Necessity were reviewed and approved by the OAL. During the required ten-day stakeholder comment period prior to adoption of the regulations, no objections were filed. Finally, this rulemaking is in response to an OAL determination requiring this action.

Commenter #2:

Comment A: Commenter 2 states that the 60 days is too short a time period to give a meaningful time for recovery. That 90 or even 120 days is more realistic. The commenter contends that many illnesses/injuries require a lengthy time for healing.

Accommodation: None.

Response to Comment A: The CDC contends that 60 day standard is appropriate for short-term temporary work restrictions. The CDC adopted the 60 days to be transparent with existing bargaining language that provides for light duty assignment for up to the maximum of 60 days. When an injury or illness is expected to last longer than this time period, the interactive process is initiated and other employment options are discussed.

Comment B: The commenter feels that light duty should be available for out of class assignments if no light duty is available within the work group. The commenter states that this enables an employee to work productively at something and benefits another work group, which may be short staffed for any number of reasons. Lastly, the commenter states it may improve employee mutual understanding and cooperation with other employees. Staff, by this means, have an opportunity to experience what other staff's work is like.

Accommodation: None.

Response to Comment B: The CDC contends commenter #2's desire to accommodate employees in budgeted positions outside the employee's classification is not supported by law. An Arbitration Award (*International Union of Operating Engineers vs. California Department of Corrections*) determined that the CDC violated the Memorandum of Understanding for Bargaining Unit 12, Article 18.3 by assigning or permitting employees who were not part of that bargaining unit to be assigned those duties.